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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-186

ANDREW MUNCHAK, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

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Notwithstanding the fact that the issue of suppression was raised and briefed both in the District Court and the Court of Appeals, the opinion of the District Judge, on which the Court of Appeals affirmed, treated petitioner's motion solely as a motion for a new trial based on perjury committed by a prosecution witness. The government does not contest this. Nevertheless, in its memorandum in opposition to the petition for certiorari, the government relies on the opinion of the District Judge and ignores the fact that certiorari is not being sought on the basis of the perjury issue.

The government's perfunctory memorandum attempts to dismiss the issue of suppression with the statement: "There was no suppression by the government, either intentional or accidental." Not only is this statement unsup-

ported by any factual explanation or by any reference to the record or citation of authority, but it is also totally at variance with the uncontested facts set forth in the petition.

The government argues that the suppressed test results were not conclusive, that the importance of the representation of RCA manufacture at trial is overstated and that the evidence suppressed would not have been significant. This ignores the following:

1. The test is not whether the suppressed evidence would be conclusive. Where evidence is suppressed, it is sufficient that the evidence was material. In the present case, the evidence in question was highly material in several respects (Pet., pp. 18-20).

2. The issue of RCA manufacture was important. Upon its initial review the Court of Appeals specifically affirmed petitioner's conviction on the ground that the evidence showed the parts in question were not manufactured by RCA (Pet., pp. 7, 19).

3. The jury obviously thought the issue of manufacture was a key issue. During their deliberations, the jurors submitted a handwritten note to the District Judge. The note, which is a part of the record, reads as follows:

> "We would like to pinpoint Mr. Kick's testimony in regards to this question, *if R.C.A. could have manufactured the 2N1225 in question*" (Emphasis supplied).

The government's response to petitioner's contention that a hearing should have been ordered is inaccurate. Footnote 1 of the government's memorandum misstates page 22 of the petition. Petitioner's counsel obviously could not advise the District Court that all the facts were already

before it, as the government now intimates. In fact, he did not do so (76B).

The District Court concluded that the facts before it were not sufficient to warrant a new trial. However, instead of directing a hearing or the submission of affidavits by the government by means of which the conduct of the prosecution could be examined more fully (assuming additional facts were required, which we contend is not the case under the applicable holdings of this Court), the District Court simply denied petitioner's motion, noting that neither side had affirmatively requested an evidentiary hearing. It should also be noted that at the time, neither counsel nor the District Court had the benefit of this Court's holdings in *Giglio* and *Moore,* both of which are highly pertinent.

For these reasons the petition suggests, as an alternative basis for certiorari, that it would be appropriate to remand the case to the District Court for further consideration in light of the recent holdings of this Court, even if the Court is not inclined to review the issues raised by the petition on their merits. See *Giles* v. *Maryland,* 386 U.S. 66 (1967).

The absence of any attempted answer by the prosecutors or by the postal inspector to the showing of suppression is not consistent with the appearance of justice and due process in the federal courts. The plain fact is that the government has consistently refused, even in this Court, to come forward to explain the circumstances leading to the suppression of material evidence repeatedly requested by the defense, production of which was agreed to in principle by the government prior to trial, which was utilized by the government before the grand jury, was misrepresented by the government's witnesses both before the grand jury and at trial, and the absence of which was argued in summation by the government's trial counsel to

the jury which convicted petitioner. Neither justice nor the dignity of our government and courts can be served by a conviction whose integrity is tainted.

Respectfully submitted,

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